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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-259

R. L. GARDNER, ET AL., PETITIONERS

v.

THE NASHVILLE HOUSING AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners contend that the designation of the area in which they own residential property as an urban renewal area was invalid, because of an alleged conflict of interest and the alleged inadequacy of the prior hearings, and that the statute under which federal funding of the urban renewal project was authorized denies due process because it allegedly permits condemnation of property for nonpublic purposes.

Section 112 of the Housing Act of 1949, as amended, 42 U.S.C. 1463, provides that when an educational institution or hospital is located in or near a slum or blighted area, and the local municipal government determines that an urban renewal project in such area

would promote the public welfare and the proper development of the community, the project may be eligible for federal grants-in-aid if certain federal standards are met; land in such an urban renewal area may be made available to such educational institution or hospital for redevelopment in accordance with the use specified in the urban renewal plan. In August 1961, the Nashville, Tennessee City Council [1] designated an area of that city as a slum or blighted area for the purpose of the Act. It also requested that the Department of Housing and Urban Development (HUD) advance funds, pursuant to 42 U.S.C. 1452, to finance a survey to determine whether that area would qualify as an urban renewal area under applicable federal and state statutes and regulations. The area included the campuses of Vanderbilt University, Peabody College, and Scarritt College.

HUD advanced the funds for the survey, which was conducted by an urban planning firm, employed by the Nashville Housing Authority ("NHA"). This survey indicated that the area was blighted and deteriorating and that all conditions necessary for federal funding of an urban renewal project could be met.

A project site office was opened within the urban renewal area; its maps and plans of the proposed project were available for public inspection. On November 4, 1965, NHA sponsored a public hearing to acquaint the community with the proposed project.

[1] In 1963 Nashville changed its form of government to the Metropolitan Government of Nashville and Davidson County.

A second community-oriented NHA-sponsored meeting was held on July 19, 1967, to discuss the final plan for the project. Petitioners and other homeowners attended both meetings.

The final project report was submitted to the Nashville Metropolitan Council for approval on August 1, 1967.[2] Six days thereafter the Council held a public hearing, attended by approximately 350 to 500 persons, at which all aspects of the urban renewal project were debated.

After spirited discussion, the Council adopted the project report and the recommendations of NHA, concluding that the project area constituted a "slum, blighted and/or deteriorated area" within the meaning of both state and federal urban renewal laws and regulations (Pet. App., p. 49). An application for a loan and grant-in-aid contract was thereafter submitted to HUD. The application was approved on March 20, 1968 (Pet. App., p. 30).

Two years later, on March 26, 1970, petitioners, owners of residential property in the proposed urban renewal clearance area,[3] brought suit in federal district court seeking to enjoin NHA's eminent domain pro-

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[2] A housing authority in Tennessee must gain the approval of the governing body of its respective city or town before an urban renewal project may be initiated. T.C.A. 13-815 (1973) (Pet. App., pp. 50-52).

[3] Two-thirds of the area covered by the urban renewal project was a rehabilitation area, in which owners of all structures were required to bring their properties up to minimum standards. The remaining one-third of the area was a "clearance area" in which all the land was to be acquired by Vanderbilt University, all structures removed, and the entire area redeveloped by the University (Pet. App., p. 70).

ceedings and to have the federal grant-in-aid legislation, 42 U.S.C. 1463, declared unconstitutional.[4] This action was dismissed for lack of jurisdiction after trial because a necessary party, the Secretary of Housing and Urban Development, had not been joined (Pet. App., pp. 25–62). The court of appeals affirmed that holding but remanded the action to give petitioners an opportunity to join the federal defendant (Pet. App., pp. 63–65).

The remanded case was subsequently heard on a stipulated record. On March 4, 1974 the district court again dismissed petitioners' suit, holding *inter alia,* that 42 U.S.C. 1463 was constitutional; that the actions of the municipal government and HUD in designating the proposed project area a slum and blighted area, within the meaning of the applicable state and federal statutes and regulations, were neither arbitrary nor capricious; that petitioners were afforded an adequate hearing; and that there was no unlawful conflict of interest (Pet. App., pp. 66–83). The court of appeals affirmed *per curiam* (Pet. App., pp. 85–89).

1. Petitioners contend (Pet. 11–14) that various conflicts of interest invalidated the urban renewal project. In particular, they allege that such conflicts arose from the facts that officers of two major Nashville banks were also trustees of Vanderbilt University; that other officers of these banks served as commissioners of the NHA; and that the urban planning

[4] The two suits were initially brought separately but were tried together.

firm retained by NHA in 1961 to conduct the survey of the urban renewal area had been retained by Vanderbilt University in the late 1950s to assist it in formulating a master plan for future expansion. The district court rejected the claims of conflict, finding (1) that there was no evidence that the urban planning firm exhibited a bias in favor of Vanderbilt University or that it conducted its surveys of the urban renewal area with a purpose to qualify it for federal funding (Pet. App., p. 76); (2) that there was "not the slightest bit of evidence that any of these [bank officers] were, in their public capacities, at any time motivated by any purpose other than serving the interests of the community" (Pet. App., p. 78);[5] (3) that there was no indication of self-interested dealings or of "personal pecuniary interest" affecting the propriety of the decisions of the bank officers in their capacities as NHA commissioners (Pet. App., p. 78).[6] The court of appeals specifically

[5] T.C.A. 13–910 (1973) provides in pertinent part: "No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing projects."

[6] As the court of appeals found, the commissioners' lack of personal interest in or ownership of property in the urban renewal area distinguishes this case from *Wilson* v. *Iowa City*, 165 N.W.2d 813 (Iowa Sup. Ct.), upon which petitioners rely. The other cases cited by petitioners do not concern the showing necessary to prove actual bias. They are addressed to the composition of an impartial and disinterested administrative tribunal.

concurred in these findings, stating that petitioners' allegations were unsupported in the record (Pet. App., pp. 88–89).

Both lower courts having concurred in these findings, review of these factual determinations in this Court is foreclosed by petitioners' inability to make a "very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275; *United States* v. *Reliable Transfer Co., Inc.*, No. 74–363, decided May 19, 1975. Petitioners' contentions on this point merely challenge the factual determinations made below and do not warrant review by this Court.

2. Petitioners further assert (Pet. 14–17) that NHA, the Metropolitan Council, and HUD all acted arbitrarily, capriciously, and in bad faith in declaring the project area to be a slum or blighted area for purposes of the Act. The district court correctly rejected this argument (Pet. App., pp. 80–81), finding that these agencies acted in accordance with the legal requirements for the establishment of an urban renewal program. It therefore refused to substitute its judgment for that of the agencies.

Tennessee law defines a blighted area as one detrimental to the safety, health, morals, or welfare of the community by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use, or obsolete layout. T.C.A. 13–813 (1973). The HUD Urban Re-

newal Manual requires that in order to qualify for federal funding, at least 20 percent of the buildings in a proposed urban renewal area must contain one or more building deficiencies and that the area itself must contain at least two environmental defects (Pet. App., p. 28). The trial court held that the facts adduced before it supported the administrative agencies' determination that the structural unsoundness of the housing stock and environmental deficiencies existing in the project situs satisfied the criteria for classification as a slum and blighted area (Pet. App., pp. 80–81).[7] Accordingly, it sustained that determination. The court of appeals affirmed this ruling (Pet. App., p. 87). The essentially factual question whether the administrative decisions were supported by substantial evidence does not warrant further review.

3. Petitioners' contention (Pet. 18–21) that they were denied a fair hearing in connection with the designation of the urban renewal area as deteriorated and blighted is similarly contradicted by the evidence adduced in the trial court.

The function of the various governmental agencies in determining that the project area satisfied the criteria for urban renewal funding was quasi-legislative in nature, involving the resolution of fac-

[7] The district court noted that the evidence introduced by the defendants to support their finding of blight took the form of testimony from well-qualified independent engineers and members of the staffs of NHA and HUD, but that the evidence introduced by the petitioners originated for the most part with persons without engineering qualifications (Pet. App., p. 72).

tual questions of general applicability. See Davis, *Administrative Law,* ch. 13 (5th ed. 1973). It is the nature of the fact-finder's process, not the ultimate effect of its decision on petitioners, that determines their right to an adjudicatory hearing. *Powelton Civic Home Owners Association* v. *Department of Housing and Urban Development,* 284 F. Supp. 809, 829–830 (E.D. Pa.). Due process does not require a trial-type hearing, with the right to cross-examine witnesses, in these circumstances. Nor would such a hearing be feasible, given the number of homeowners affected by an urban renewal program.

Petitioners were afforded ample opportunities to comment and introduce evidence. Tennessee law provides that a public hearing must be held prior to approval by a local government of an urban renewal project. T.C.A. 13–815 (1973). The Housing Act of 1949 requires that if an urban renewal project is to be federally funded, a public hearing must be held before land is acquired. 42 U.S.C. 1455(d). As both lower courts found, these requirements were met in the instant case.

Moreover, petitioners attended the NHA-sponsored public hearings on the urban renewal project, held on November 4, 1965, and July 19, 1967, as well as the public Nashville Metropolitan Council meeting of August 7, 1967.[8] The project was thoroughly debated

[8] The record further discloses that petitioners frequently visited the urban renewal project site office and were given such information as was available. (Pet. App., p. 75).

at these meetings (Pet. App., p. 74). Indeed, petitioners raised before the Metropolitan Council practically all the objections to the project that they made in the district court (Pet. App., p. 74). Petitioners Adair and other property owners also were granted the opportunity to appear before the NHA Board of Commissioners before the plan was forwarded to the Nashville Metropolitan Council. After its adoption of the program, petitioners Adair and other property owners were given a further hearing by HUD officials prior to HUD's agreeing to fund the project (Pet. App., p. 75).[9]

Petitioners contention that they were unconstitutionally deprived of their right to a hearing was therefore properly rejected by the courts below.

4. Finally, petitioners argue (Pet. 21–23) that the operation of 42 U.S.C. 1463 in this case denies due process of law because the property is to be taken primarily for the private use and benefit of Vanderbilt University and only incidentally for public use.

The role of the judiciary in determining whether Congress is exercising the police power for a public purpose is a very narrow one; once the court determines that the object of the program is within

[9] Under well-established principles, petitioners had no right to an adjudicatory hearing before the Secretary. *South East Chicago Com'n* v. *Department of Housing and Urban Development*, 488 F. 2d 1119 (C.A. 7); *Shannon* v. *Department of Housing and Urban Development*, 436 F. 2d 809 (C.A. 3). Petitioners' reliance on *Appalachian Power Co.* v. *Environmental Protection Agency*, 477 F. 2d 495 (C.A. 4), is misplaced because the eminent domain action here was area-wide, not individual in impact, and did not require an adjudicatory hearing before final administrative action. See *id.* at 500–501.

Congress' authority, its right to realize that end through the use of eminent domain is clear. *Berman* v. *Parker,* 348 U.S. 26, 32–33. Clearance of blighted areas and slums and reconstruction of those sites has been found to be a valid public purpose. See *Berman* v. *Parker, supra; Harrison-Halsted Community Group* v. *Housing and Home Finance Agency,* 310 F. 2d 99 (C.A. 7), certiorari denied, 373 U.S. 914. The courts below correctly found that in view of the deteriorated quality of the project area, an important public purpose would be served by its reconstruction (Pet. App., pp. 71–73; 86–88). See also *Nashville Housing Authority* v. *City of Nashville,* 192 Tenn. 103, 237 S. W. 2d 946, 949–950.

Once the public purpose of a program has been demonstrated, Congress alone may determine the proper means for its execution. It may conclude that the public well-being may be better served through redevelopment by private enterprise, rather than by a department of government. *Berman* v. *Parker, supra,* 348 U.S. at 33–34. Furthermore, the fostering of institutions of higher learning provides a separate benefit for the public. 42 U.S.C. 1463; see 1959 U.S. Code Cong. & Adm. News 2865 and 1961 U.S. Code and Cong. & Adm. News 1953.

42 U.S.C. 1463 provides for the participation of educational institutions and hospitals in urban renewal programs, and further provides that their expenditures for the acquisition and redevelopment of property within the project area shall be counted as a local grant-in-aid in determining the proper level of federal funding. Under the standards set forth in

Berman, this statute is not unconstitutional. *Ellis* v. *City of Grand Rapids,* 257 F. Supp. 564 (W.D. Mich.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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